SUPREME COURT, U. S.

71-1327

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1971

No. A-961

JOSEPH SCHWARTZ and BENJAMIN FRIEDLANDER,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Joseph Schwartz and Benjamin Friedlander respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit, rendered on February 16, 1972, affirming a judgment of the United States District Court for the Southern District of New York, convicting them of making a false statement to a federal agency and of using the mails to defraud, and sentencing each petitioner to a fine of $2,500.00 and two years' probation.

Opinion Below

No opinion was rendered by the Court below.

Jurisdiction

The judgment of the aforesaid Court of Appeals sought to be reviewed herein was rendered and entered on February 16, 1972. On March 20, 1972, Mr. Justice Marshall signed an order extending petitioners' time to file a petition for a writ of certiorari to and including April 16, 1972.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254.

The basis for federal jurisdiction in the United States District Court was the provisions of 18 U. S. Code Secs. 1001 and 1341.

Questions Presented for Review

1. Did the Government prove the fraud essential to sustain either count of the indictment?

2. Did the Trial Court err in refusing to charge that the defendants were entitled to the benefit of conflicting inferences?

Statutes Involved

The statutes under which appellants were convicted are as follows:

18 U. S. Code Sec. 1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact,

or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or untruth, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U. S. Code Sec. 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U. S. Code Sec. 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place

at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, 'shall be fined not more than $1,000 or imprisoned 'not more than five years, or both.''

Statement of Case

The basis of the prosecution, simply stated by the Government at the outset (4) was that the defendants were submitting daily bills of work done, which bills were false in that they claimed for more work than was actually done. The Government's evidence was predicated upon surveillance. It was conceded that "because of the nature of the surveillance, the agents are never able to be sure exactly how many men are involved, and therefore we are not claiming there is any falsification in the number of men" (10). Accordingly, the prosecution urged "only . . . three items of falsification . . ., the daily claims of how many loads are being made, the hours and the trucks" (10-11).

The first witness was F. B. I. agent Donald E. Jones, who directed an official investigation into defendants' moving of Eskimo Yarns, Inc. (11-12). There were more than six agents who assisted, with the bulk of the work done by him and John F. Higgins (13). The surveillance covered a period of about twenty days in December, 1967, and January, 1968 (12). The logs were received in evidence, and one was read into the record (18-23). The witness testified to a conversation with defendant Schwartz on June 13, 1968, wherein Schwartz stated that the affidavit of claim was true and accurate (24-25); that his company had five vans; they had no permanent work force; that the number employed ranged from six to thirty, all being hired as needed (26). On January 3, 1969, he spoke to defendant Friedlander, whose information was to the same effect (29-30).

Cross-examination of Jones elicited a number of shortcomings in the surveillance. Thus he did not know what took place prior to 9:30 A. M. (44). His observation was incomplete in many respects (48-50). He admitted he could not see inside a truck; while merchandise was being taken, he did not know whether a truck was full, half full or three quarters full (50). In another instance he could not say what had happened at either of two locations before 10 A. M. (52). On another occasion surveillance was suspended for more than an hour (54). In some cases he had no way of knowing what took place inside the subject premises, nor could he see inside the basement (54-55). On January 10 his surveillance did not begin until 2 P. M., and on the following day at 8:55 A. M. (56-57), discontinuing between 10:30 A. M. and 1:50 P. M. (59). He could give no information of truck movement in the interim (60). On January 16 he discontinued observation at 4:40 P. M. (62). During much of the time he was unable to see if there was anything in the trucks (64)—most significant in a case involving the loads. The witness admitted that the object of the surveillance was to be "as discreet as possible, so it wasn't always possible to go up and physically look inside a van that was in the area" (65), nor did he "attempt to count the number of men who were actually involved in the move itself" (65).

The next witness, John F. Higgins, a retired F. B. I. agent, testified as to his surveillance in January, 1968 (67), and his logs were received in evidence (68-70). He admitted that the descriptions made in his logs were "on a selective basis" (87). He had no contact with either defendant (87-88).

The Government's last witness was Richard S. Coyle, supervisor of the Central Claims Unit of the New York City Department of Relocation (95). He testified that the Federal Government's Department of Housing & Urban Development reimburses New York City for moving ex-

penses where the claim is less than $25,000 (97). He would receive from a tenant a recap of the invoice of movers such as defendants herein (98). The daily bills and affidavits were received in evidence (99-102), the bills of lading indicating the number of vans, the number of men and the hours (102). He visited the subject premises on five occasions, namely, December 28 and 29, 1967, and January 3, 4 and 5, 1968 (105), to check on the work being done "considering the number of vans and men who were used on the move" (106). Of utmost importance is the conclusion of his direct testimony: on each of the days he visited the premises, he counted the men and vans, and found them to be the same number as recorded by defendants, there being "absolutely . . . no discrepancy" (107). He reiterated this statement on cross-examination (140). Defendants' charge for the move was $21,852, while the witness had been of the opinion that the price should have been $15,997.10 (144-145), and even this figure he reduced by almost $5,000 after conversations with the Assistant United States Attorney in the course of preparation for trial (146-147). In reaching the last figure he admitted that he did not revisit the premises, and that he did not take into account the material item of the basement at Ludlow Street (147).

Defendant Schwartz testified that he surveyed the subject premises for a day and a half and estimated the moving cost at about $22,000 (187-191). He gave the basis for his estimate (191-193). Two weeks later he reduced his figure by $1,000 (194-195). The supervisor of relocation made him an offer of $18,000, which he promptly rejected (196-197). The work commenced towards the end of December, but he was not present at the time, having left for Florida with his family on December 22 or 23, returning about January 4 (197-198). He described the procedure of hiring men (198-202). His codefendant would prepare the bills (209). In this connection they relied upon what they

were told by the foreman and did not go to the job to check the work being done (210). As far as Schwartz knew, everything was authentic (211). He had met Agent Jones at least six times, once at F. B. I. headquarters; their conversation related to union officials, two of whom were indicted, and never to defendants' operations (211-213). He knew that the Department of Relocation had not approved the charge and he was aware that Coyle was checking the men and trucks every morning (244).

Defendants called five character witnesses to attest their reputation for truth and honesty (245-257).

Defendant Friedlander testified that his first connection with the Eskimo Yarn moving job was during its progress, when he got a call from his foreman (one Fishman, who was his son-in-law) to the effect that Coyle, from the Department of Relocation, was there and objecting to something (261). He described the billing procedure (266-267). When the day's work was completed he would receive a report from the foreman and would note the amount of men, vans and work finished that day (267). He described some of the details of the job, including the need to move contents or merchandise to a side in order to open up shelving; the Department of Relocation objected to such steps, characterizing them as "double handling" (278). Bills were made out at the rates fixed by the Public Service Commission (282). He explained some of the special difficulties in the Eskimo Yarn move, referring, among other things, to a differential allowance necessitated by having to carry items up or down stairs; the three floors that had to be moved; four basements and a terrace; the loading of merchandise which could not be used exactly at that time so that it had to be brought back; and the cutting of shelving which had to be brought back to his warehouse (285-290). Defendants had been paid no part of their bill for approximately $21,000 (313).

REASONS FOR ALLOWANCE OF WRIT

I

The Government failed to prove the fraud essential to sustain either count of the indictment.

Whether the proof be viewed as being offered in support of the charge that defendants made a false statement to a Government agency, or as an incident of fraudulent use of the mails, it is abundantly clear that the evidence falls far short of establishing either the falsity of the representation or the existence of scienter, that degree of guilty knowledge rendering an individual criminally responsible for the consequences of his acts.

We shall not repeat the summary of the evidence as outlined above. We submit that it is merely necessary to scan the record to come to the conclusion that the Government's case was so utterly flimsy as not to justify its submission to the jury. In essence we are confronted with a situation where a moving firm is performing a contract whose compensation is derived from public agencies, and where government officials have the feeling that the bill should have been less. To implement this belief, several F.B.I. agents engage in a procedure of surveillance at divers incomplete hours, and file logs impressive in number but deficient in substance. If there are moments when specific trucks are idle, there are obviously other times—unnoticed—when they are being operated. Then there is the emphatic statement of the supervisor called as a Government witness that on the five occasions when he visited the premises for the specific purpose of checking on the number of men and vans as against the figures claimed by defendants and could find "absolutely . . . no discrepancy" (107). In short, so long as the surveillance crew was not in active operation during the entire time

of the removal, their reports must be deemed fragmentary and incomplete, and consequently falling far short of what would be requisite to establish falsity.

Secondly, if by way of argument only it be assumed that the Government proved that the bill and the affidavit were not in accordance with the facts, there is still the hurdle of showing that defendants knowingly transmitted false bills. The Government's posture in this regard appears to be the suggestion that guilty knowledge may rest upon inference, conjecture or surmise.

The insufficiency of the proof is frequently apparent in the tenor of the colloquy incidental to defendants' motions to dismiss. The Government's claim, to begin with, was that the amount charged was unreasonable because not all the work set forth was performed (164). When the Government rested, the trial Judge admitted that he had to look at the evidence "with respect to the falsity of the work performed" (164). When the prosecutor stated that "the trucks arrived at different times, the claimed number of loads were not made and that there were no people there on some occasions," the Court was constrained to remark, "You are going to have to show me that" (165). The Court also seemingly expressed doubt that when the agents saw two loads but not a third, that would be indicative of the nonexistence of a third (169), and asked to be shown "where there is any really big discrepancy" (170). It was also pointed out that the head agent, Jones, was admittedly unaware of some of the locations involved in the moving operation, specifically of 67 Ludlow Street (272).

The Court was also quite concerned about the supposed proof, if any, of guilty knowledge, saying (273):

> ". . . Even assuming that there are some discrepancies here between the agent's testimony and

> the tally sheets, where is the evidence that this was a knowing, intentional, wilful fraud?"

To this the prosecutor was obliged to respond at the outset (273), "There are no admissions by the defendants that they knew that they were cheating." He then proceeded to suggest that one "apply common-sense inferences, like is it likely that the owners of a small organization are going to know what is going on with their operation—that the jury could find that these defendants knew that the documents that were being submitted on a daily basis contained falsities, and that the reason they contained falsities is that you get paid on the basis of your men and your hours and your trucks" (174). In other words, the amazing contention is made that any one being paid on a piecework basis or the equivalent must necessarily submit a false bill merely because he knows the basis of compensation. Nevertheless, the prosecutor candidly declared (174), "And that, very simply, your Honor, is the Government's position in this case." Finally, the prosecutor observed that he had to review the many documents in his concluding address to the jury "and show them where the Government claims there is a problem. It is a technical case" (336). Again and again in his summation the prosecutor reiterated, "Mr. Schwartz and Mr. Friedlander had to know what was going on" (379); "they had to know what was going on" (379); "how can the principals, the people who run the company, not know what was going on" (381); "the defendants had to know" (382). It becomes increasingly apparent that the Government relied below upon an inferential compulsion rather than concrete or credible evidence.

If that be deemed a sound procedure, any invoice in which an overcharge is discernible—which we do not concede herein—, the vendor must be regarded as one who intends to defraud. No penal statute is susceptible of any

such strained construction, nor may criminal liability be predicated upon any situation of this kind. Negligence or inefficiency do not constitute a substitute for guilty knowledge, and if those factors are perceptible in this record, they may not justly be invoked to sustain the result.

As was stated in *United States* v. *Sheiner*, 273 F. Supp. 977, affd. (C. A. 2) 410 F. 2d 337, cert. den. 396 U. S. 825:

> "If the defendants' acts were done inadvertently, mistakenly, or in good faith without an intention to defraud, then the government has not sustained its burden of proof, and the defendants must be acquitted."

The instant case comes squarely within the scope of the principle.

II

The Court erred in refusing to charge that defendants were entitled to the benefit of conflicting inferences.

The inclusion of the present point is not to be regarded as detracting from the preceding argument. Even if it be assumed that the Government established a *prima facie* case, the omission from the instructions of the vital request about to be mentioned was plainly reversible error.

After the charge was concluded, defendants made a single request (403):

> "Your Honor, the only request I have is a request that your Honor charge, as I requested previously, that if two inferences are equally consistent from the facts the jury is required to draw the inference that leads to an acquittal."

Counsel indicated that the matter was amplified by his request number 4, which the Court made part of the record (403, and following 403a):

> "The indictment is not to be treated as raising any kind of presumption or creating any kind of prejudice against the defendant. The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty, you must believe from all the evidence and beyond a reasonable doubt that the facts proven are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the inference most favorable to the defendant."

The request was refused by the Court, which stated that it declined to amplify the charge in that respect (403).

The general rule is thus stated in 23 C. J. S. 570, with citation of numerous authorities:

> "If the circumstantial facts proved can be reconciled either with the theory of innocence or with the theory of guilt, the theory of innocence must be adopted and a conviction cannot be sustained, even though the theory of guilt is the more probable."

In *Turinetti* v. *United States* (C. C. A. 8) 2 F. 2d 15, it was held that where the circumstances were susceptible of two inferences, the defendant was entitled to the inference of innocence.

Likewise, in *Galatas* v. *United States*, 80 F. 2d 15, affd. 297 U. S. 11, the Court declared:

> "If the evidence is as consistent with the innocence of the defendants as with their guilt, of course, no convictions can be properly had."

And in *Vernon* v. *United States* (C. C. A. 8), 146 F. 121, the rule was expressed in the following language:

> "If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted. . . . Assuming that the jury would be justified to draw either of these inferences, the rule of law is that in case of conflicting presumptions that which assumes innocence must be adopted."

Since the foregoing expressions manifestly constitute the law, defendants herein certainly were entitled to have the jury instructed accordingly.

Especially in a case where jurors might conclude that the defendants were careless, inefficient, mistaken or too reliant upon employees, rather than pursuing a course of fraud, it became most important that the rule of conflicting inferences be clearly expounded. The instructions can be scrutinized in vain for any language susceptible of such construction, and the verdict may well have been the product of the omission.

Conclusion

The case is one wherein petitioners have been unjustly convicted. The present application presents meritorious and certainly arguable questions on subjects likely to arise in other cases and of a character calling for authoritative disposition. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed and that petitioners be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y.
April 12, 1972

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